

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.622(b),
Table of Allotments,
Digital Television Broadcast Stations.
(Boca Raton, Florida)

MM Docket No. 00-138
RM-9896

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2005

Released: June 1, 2005

By the Chief, Video Division:

1. We herein consider a "Petition for Further Reconsideration," filed by Sherjan Broadcasting Company, Inc. ("Sherjan"), of our action substituting DTV Channel *40 for station WPPB-TV's assigned DTV Channel *44 at Boca Raton, Florida. *See Report and Order* in MM Docket No. 00-138, 17 FCC Rcd 7114 ("Report and Order"), *recon. denied in relevant part*, 17 FCC Rcd 23528 (2002) ("Reconsideration Order").

2. The subject digital channel substitution was taken at the request of The School Board of Broward County, Florida ("School Board"), licensee of noncommercial educational station WPPB-TV, NTSC Channel *63, Boca Raton, Florida. Sherjan, the licensee of Class A station WJAN-CA, operating on channel 41 at Miami, Florida, opposed the channel substitution.¹ It alleged, among other things, that the proposed allotment of DTV Channel *40 at Boca Raton would be first-adjacent to WJAN-CA and would result in prohibited contour overlap with its Class A station. Among other things, the staff noted that WJAN-CA would receive interference to 1.03 percent of its population served. The staff concluded that the proposed channel substitution met relevant technical requirements and interference protection rules and should otherwise be granted.²

3. Sherjan sought reconsideration of the channel substitution. Among other things, it argued that the 2 percent maximum interference standard used by the staff does not apply to Class A stations, which are entitled to protection from any new interference. It further asserted that, having concluded that the Boca Raton proposal would cause interference to 1.03 percent of WJAN-CA's service population, the staff must rescind the allotment of DTV Channel *40 at Boca Raton. However, the proponents of the channel substitution stated that without regard to applicable interference limits, the factual premise of Sherjan's argument – that there will be interference to 1.03 percent of WJAN-CA's service population – is incorrect. They stated that

¹ Guenter Marksteiner, a party to an earlier proceeding, supported the channel substitution proposal, and filed oppositions to both this and Sherjan's earlier reconsideration pleadings.

² As discussed *infra*, the staff applied an interference standard based on 2 percent of the population served by a Class A station rather than consider any new interference to the Class A station's service area.

the 1.03 percent figure was based on OET Bulletin 69 methodologies using the Commission's computer program with standard values for measuring population.³ However, the proponents pointed out that they also made a more accurate alternative showing to demonstrate that the proposed channel change would not cause any unacceptable interference to WJAN-CA. Specifically, they noted that using a terrain profile step size of .01 km rather than the standard default value of 1 km to more accurately measure affected populations, their proposal would not result in unacceptable to WJAN-CA.⁴ They therefore maintained that notwithstanding the application of an incorrect interference standard, the channel change would not result in new cognizable interference to WJAN-CA.

4. In responding to the petition for reconsideration, we stated that Sherjan was correct that the staff erroneously concluded that a Class A station must accept interference of up to 2 percent of its service population. Section 73.623(c)(5) of the Commission's Rules provides that proposals to expand a DTV station's allotted or authorized coverage area will not be accepted if it is expected to cause interference to a Class A television station. Moreover, because the incorrect 2 percent interference standard was applied, the *Report & Order* did not discuss the proponents' interference prediction methodology or its alternative interference showing as originally tendered. Therefore, on reconsideration, we re-examined the technical information submitted by Proponents to assure compliance with Section 73.623(c)(5) of the Rules.

5. Upon that reexamination, we found that the technical information submitted in support of the requested channel substitution contained not only the required standard interference showing, but also the specifically identified alternative interference showing. That alternative showing concluded that no unacceptable interference would be caused to WJAN-CA's protected service population. We were not persuaded by Sherjan's general argument that the use of the proffered alternative showing using the 1-km cell size resolution is inappropriate to calculate new interference in this case. We therefore concluded that the proponents demonstrated compliance with Section 73.623(c)(5) of the Commission's Rules with respect to predicted interference to WJAN-CA.⁵

³ Population predicted to receive interference using standard default values is determined by analyzing 2-kilometer (km) resolution calculation area "cells" at 1-km terrain profile "steps" applying 1999 U.S. Census Data. See *Public Notice, Additional Application Processing Guidelines for Digital Television (DTV)*, released August 10, 1998 ("1998 Public Notice"). See also *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, 5973 (2001). The 1.03 percent interference figure used by the proponents and the staff was derived using standard default values for determining affected WJAN-CA population.

⁴ The 1998 Public Notice permits a DTV applicant to submit and request review of an alternative technical interference study based on a finer resolution than the Commission's standard. *Id.*, at 2. Such an alternative showing is permitted because the finer resolution eliminates those persons that might be included in a larger cell population count that would not actually receive interference. The proponents' alternative study showed that no more than 0.03 percent new interference would be caused to WJAN-CA's service population. Subject to the rounding tolerance, the 0.03 interference figure is rounded down to zero.

⁵ The proponents, as part of their opposition to the petition for reconsideration, proffered additional interference studies based on new computer programs allowing for even more refined population studies to further demonstrate

6. In the instant pleading, Sherjan asserts that if the Commission is going to use an alternative technical showing based on more accurate population measurements instead of using the standard default values, it should be even more precise and consider more alternative population studies, with various cells sizes smaller than the default values, to establish an even more refined analysis to determine the true impact of the rulemaking proposal. It therefore submits analyses of 14 different cell sizes and, using updated 2000 census population figures, concludes that interference to WJAN-CA is less than 0.5 percent in only two out of 14 cases (at 1 km and 1.8 km) and exceeds that figure in every other case.⁶ Sherjan argues that the staff acted arbitrarily and capriciously by allowing the proponents to rely on a non-standard cell size and then select a convenient cell size to yield the desired result. Moreover, it states that it has styled its pleading as a second petition for reconsideration, rather than as an application for review, "because the Bureau has not yet had the opportunity to evaluate and to rule on the data for 14 different cell sizes and Year 2000 census data."⁷

7. **Discussion.** We will dismiss the instant pleading. As we have explained previously, the proponents are permitted to make the necessary interference showing using the alternative 2-km cell size with 0.1 km terrain profile steps interference study based on the 1999 census data. Sherjan did not challenge the results of that interference study when it was originally tendered, but instead argued that there was no basis for the proponents to deviate from the standard default values for population measurement to demonstrate compliance with Section 73.623(c)(5) of the Commission's Rules. There was nothing before us then, and Sherjan offers no new basis now, to require us to reject the proponents' alternative interference showing.

8. Its argument opposing the use of an alternative interference study having been rejected, Sherjan now submits a host of new interference studies. It claims that if the Commission is concerned with accuracy, it must study the newly proffered additional interference studies, based on a variety of cell size studies and with updated population figures, in order to conclude that the proponents have not demonstrated compliance with interference requirements. However, just as we did not consider new information submitted by the proponents in support of their opposition to Sherjan's petition for reconsideration, we decline to consider new factual information submitted in support of Sherjan's "further" reconsideration petition. A reconsideration petition will not entertained to evaluate additional or new information used to reargue matters already considered.⁸ Sherjan has not shown, either earlier in

that no interference would be caused to WJAN-CA. Sherjan objected to the submission of this "new" information, and the interference findings underlying the *Reconsideration Order* are based only on the technical studies as originally tendered by the proponents.

⁶ The cell sizes included in Sherjan's analysis are at 0.1 km increments from 0.2 km to 1.0 km, and 0.2 km increments from 1.0 km to 2.0 km.

⁷ In his opposition pleading, Marksteiner states that Sherjan's arguments and new technical submissions lack merit and represent an untimely attempt to reargue allegations that were considered and rejected earlier.

⁸ See Section 1.106(c) of the Commission's Rules. In this regard, we used original submissions, not updated info

the proceeding and throughout its two reconsideration petitions, that the proponents' interference study as tendered is inaccurate or otherwise inappropriate, that the staff erred by following the *1998 Public Notice* with respect to the tendered interference study, or that additional interference studies must be considered in evaluating compliance with Section 73.623(c)(5) requirements.⁹

9. Accordingly, IT IS ORDERED, That the "further" Petition for Reconsideration filed by Sherjan Broadcasting Company, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That our action taken at the request of The School Board of Broward County, Florida ("School Board"), licensee of noncommercial educational station WPPB-TV, NTSC Channel *63, Boca Raton, Florida, substituting DTV Channel *40 at Boca Raton, Florida, for station WPPB-TV's assigned DTV Channel *44 IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

provided by either the proponents or the objector.

⁹ As an additional matter, the various studies proffered by Sherjan do not compel a finding that the proponent's alternative study is incorrect or is otherwise unreliable or inconsistent with the *1998 Public Notice*. In this regard, there is no basis for us to examine different and varied technical proposals or to average or otherwise aggregate their results. Any given technical proposal based on Longley-Rice methodologies is evaluated on the specific technical factors (*i.e.*, specifically identified operating parameters and values) presented, and not other hypothetical studies employing different factors and values. While Sherjan's newly submitted studies may yield different results due to the varying factors (*e.g.*, differing cell sizes and population figures), they do not undermine the proponents' originally tendered interference study. Finally, the acceptance of such information at this late stage of this proceeding would serve to impair the ability of the Commission to make a final decision based on information properly before it at the time.